BILLY MORRY

IBLA 76-545 Decided April 4, 1983

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-17886 in part.

Set aside in part and remanded.

1. Alaska: Native Allotments--Mineral Lands: Determination of Character of--Mineral Lands: Nonmineral Entries

> Lands are known to be valuable for mineral when known conditions are such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end.

2. Administrative Procedure: Hearings--Alaska: Native Allotments--Rules of Practice: Hearings

> Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

APPEARANCES: William Rives, Esq., Seattle, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Billy Morry appeals from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated December 22, 1975, rejecting Native

allotment application F-17886 in part. In this application, appellant sought an allotment of 160 acres, divided equally into 80-acre parcels designated parcel A and parcel B. BLM found parcel A to be proper for allowance as a Native allotment, but rejected appellant's application for parcel B because it was found to be valuable for phosphate, contrary to the requirements of the Alaska Native Allotment Act (Act), 43 U.S.C. § 270-1 through 270-3 (1970), repealed by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976), subject to applications pending on December 18, 1971. The Act authorizes and empowers the Secretary "in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska, or subject to the provisions of sections 270-11 and 270-12 of this title, vacant, unappropriated, and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits." 43 U.S.C. § 270-1 (1970).

As originally set forth in Morry's application, parcel B was a tract of 80 acres in W 1/2 SW 1/4 protracted sec. 16, T. 13 S., R. 2 W., Umiat meridian, Alaska. This application, signed by appellant on August 25, 1971, alleged use and occupancy of the land since 1938 for trapping. The Bureau of Indian Affairs (BIA) forwarded this application to BLM on April 7, 1972. On August 23, 1972, during a field examination with appellant, appellant informed BLM that parcel B had been incorrectly described on his application. Appellant had meant to apply for an 80-acre parcel in protracted sec. 13, T. 13 S., R. 2 W., and protracted sec. 18, T. 13 S., R. 1 W., Umiat meridian.

Thereafter, BLM inquired of Geological Survey (Survey) whether parcel B, located in W 1/2 SW 1/4 sec. 16, T. 13 S., R. 2 W., is "valuable or prospectively valuable for coal, oil, gas, and geothermal steam, and resources prior to, on date of, and subsequent to the date of final proof." The record contains a brief, rubber-stamped memorandum to BLM, dated February 1, 1973, from Survey stating that Survey information indicates that parcel B is "without value for mineral either metalliferous or nonmetalliferous, prior to, as of and subsequent to the date of evidence of occupancy." On February 14, 1973, however, Survey issued a second rubber-stamped memorandum to BLM, finding that parcel B, located in sec. 16, T. 13 S., R. 2 W., is valuable for oil, gas, and phosphate.

A memorandum to BLM from Survey, dated February 16, 1973, sought to explain its prior inconsistent findings. Therein, Survey stated that its finding that parcel B was nonmineral had been incorrect; parcel B, Survey wrote, had been found to be prospectively valuable for oil, gas, and phosphate. More than one year later, Survey summarized its findings for a number of parcels in a memorandum to BLM dated April 15, 1974. For the first time in the record, Survey acknowledges that the location of parcel B has been altered and that it is properly set in T. 13 S., Rs. 2/1 W. The memorandum states that parcel B is considered "of mineral value" for oil, gas, and phosphate.

The record as described above raises serious questions whether lands sought by appellant for his allotment are valuable for oil and gas and phosphate, as set forth in BLM's decision of December 22, 1975. In response to

requests from BLM, Survey on two occasions undertook to determine the mineral character of land in sec. 16 that appellant no longer seeks for his allotment. Any finding that Survey made on these two occasions cannot support rejection of appellant's application for land in sec. 13 of the same township or land in sec. 18 of an adjacent township. Thereafter, without further request from BLM in the record, Survey acknowledges the altered location of parcel B and issued yet another finding.

Each of these findings of Survey is totally devoid of factual support and speaks wholly in conclusory terms. No evidence of phosphate leasing or oil and gas activity in the subject or nearby lands is provided to substantiate Survey's brief statements. An appellant seeking to rebut Survey's findings in this respect would be at a decided disadvantage given the present record.

Furthermore, it appears that neither BLM nor Survey could agree in their descriptions of the character of lands in parcel B. The record shows that Survey and BLM used the following terms to describe parcel B: "without value for mineral"; "nonmineral"; "prospectively valuable for mineral"; "of mineral value"; valuable for oil and gas and phosphate"; and "not nonmineral in character." The lack of consistency in the record undermines the deference generally accorded to Survey in matters of a technical nature. 1/ As suggested by the relevant statute, 43 U.S.C. § 270-1 (1970), a finding that parcel B was or was not "nonmineral" in character would have been sufficient.

[1] In Diamond Coal Co. v. United States, 233 U.S. 236 (1914), and United States v. Southern Pacific Co., 251 U.S. 1 (1919), Justice Van Devanter provided standards for identifying mineral and nonmineral lands. In these cases, the U.S. Supreme Court held that lands "known to be valuable" for a mineral were not nonmineral lands as set forth in the relevant statutes. Lands are known to be valuable when known conditions are such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end. An actual discovery of mineral within the boundaries of a parcel is not necessary to characterize land as known to be valuable for that mineral. Diamond Coal Co. v. United States, supra at 249; State of California v. Rodeffer, supra at 179, cited with approval in Heirs of Simon Paneak, 55 IBLA 305, 311 (1981). See also 43 CFR 2093.3-3(c)(2).

Counsel for appellant requests that the case be remanded to allow appellant to petition for reclassification of parcel B as not valuable for phosphate. In the alternative, counsel requests that the case be referred to an Administrative Law Judge for a hearing to determine whether parcel B is valuable for phosphate. Appellant has retained a geologist, counsel states, and seeks an opportunity to submit geological evidence that the land is not valuable for phosphate.

1/ We acknowledge that the legal effect of some of these terms may be the same. See, e.g., State of California v. Rodeffer, 75 I.D. 176, 179 (1968), and Foster v. Hess (On Rehearing), 50 I.D. 276, 279 (1924).

[2] In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact are in dispute, due process requires, at a minimum, the following:

> [A]pplicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143.

Following that decision, the Board ruled that the Departmental contest procedures, 43 CFR 4.451-1 to 4.452-9, would satisfy the requirements of due process. Thus, when BLM adjudicates a Native allotment application presenting a factual issue, not subject to legislative approval (see infra), BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308, 311-12, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The Ninth Circuit Court of Appeals has since held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, supra. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Before any contest proceedings begin, BLM should issue to appellant a new decision identifying those lands sought by appellant in protracted sec. 13, T. 13 S., R. 2 W., and protracted sec. 18, T. 13 S., R. 1 W., Umiat meridian, and stating whether such lands are mineral or nonmineral. If the lands are mineral, BLM should identify the mineral(s) and state the factual basis for this characterization. If the identified mineral(s) precludes approval of appellant's allotment application, the decision should so state and appellant's application should be rejected. If appellant disagrees with BLM's characterization, it should inform BLM of this fact in a timely manner and BLM should then refer the case file to the Hearings Division, Office of Hearings and Appeals, for hearing.

We note that the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 (Supp. V. 1981), did not provide legislative approval for an allotment application describing lands that may be valuable for minerals. Gregory Anelon, Sr., 60 IBLA 101 (1981). Section 905(a)(3) of ANILCA provides:

> (3) When on or before the one hundred and eightieth day following the effective date of this Act the Secretary determines by notice or decision that the land described in an allotment application may be valuable for minerals, excluding oil, gas, or coal, the allotment application shall be adjudicated pursuant to the provision of the Act of May 17, 1906, as amended, [Alaska Native Allotment Act] requiring that land

> allotted under said Act be nonmineral: Provided, That "nonmineral", as that term is used in the Act, is defined to include land valuable for deposits of sand or gravel.

The method of adjudicating this case as described above is, we believe, consistent with the Act of May 17, 1906.

BLM should also be aware of the provisions of section 905(c), providing for notice to the State of Alaska in the event that the land description in an allotment application is amended, and comply with any applicable provisions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Fairbanks District Office with respect to parcel B is set aside and the case remanded for action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Bruce R. Harris
Administrative Judge.